88-1963

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

BEN W. BEAZLEY,

Plaintiff-Petitioner

v.

MERRILL LYNCH FUTURES, INC.,
f/k/a MERRILL LYNCH COMMODITIES, INC.,

Defendant-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Ben W. Beazley, Pro Se
Plaintiff-Petitioner

3286 Wake Robin Trl.
Atlanta, GA 30341

(404) 939-8264

OUESTIONS PRESENTED

1. Is a judge's listing of a parent corporation as a liability interest on his financial disclosure documents because of his wife's margin account liability in excess of $10,000,a disqualification in a case involving the parent and a named subsidiary corporation, under 28 U.S.C.455, and the Code of Conduct waiver requirements of Canon 2 and 3, requiring recusal or a hearing before another judge as to recusal?

2. Is it a violation of due process to sanction a pro se Plaintiff by granting a Defendant's Rule 11 motion, without a hearing,or notice from the Court that cause for sanctions exist that require a response or hearing, especially when the "sanctionable" motion involves good faith complaints of lawyer/judge ethics conduct?

3. Do officers of the courts (attorneys) have a duty of factual candor to judges to disclose material adverse facts of attorney conduct, wherein house counsel for a corporation that failed to answer a complaint and summons, under oath alleged unintentional clerical oversight in the default, but failed to disclose that local defense counsel had obtained a copy of the complaint and notified defendant house counsel of the lawsuit on the third day after service was accomplished, and therefore was the false material impression a breach of judicial factual candor under FRCP 11 and a misrepresentation/fraud under FRCP 60 and this Court's 1944 decision in Hazel Atlas as to attorney ethics conduct?

4. Is it a violation of due process for the appeals court to screen cases in which notices of appeals have been filed by summarily holding the appeal is time-barred under FRAP 4 by denying Rule 59 tolling when a party filed a motion within 10 days of judgment, but inconsistently holding in similar cases that an appeal notice within 30days of judgment entry was ineffective because a post-judgment motion filed in the trial court within 10 days did toll the time?

Should a party who files a motion within 30 days of judgment to extend time to file notice of appeal,as a safeguard in connection with a pending Rule 59 motion be jurisdictionally screened if the trial court denys the extention motion,and the Rule 59 motion, in an order entered later than 30 days of the original judgment?

5. Is it a violation of due process, that a party's intangible property rights to a default judgment be denied because of a trial judge's manifest disregard of the default procedures of FRCP 55 & 60, by ex parte telephoning the local counsel of a defendant after the plaintiff properly requests default judgment, and thereafter issuing a "show cause" order which denied plaintiff a hearing,and lessened the defendant's burden under default in FRCP 60, and further denied plaintiff rights of fact-finding cross-examination as to the reasons for the default?

Is such procedure a violation of the Plaintiff's fifth and sixth amendment rights?

Should the judge VACATE his rulings if he issues an unrequested recusal after Plaintiff requests communication as to his "appearance of impropriety and the order doesn't give reasons for the recusal?

6. Is the conduct of the attorneys, law clerk, and judges in the district court, under the facts and procedures involved, such a departure from the accepted and usual course of judicial proceedings, that the appeals court per curiam affirmance without opinion, is sanctioning of the lower court's departure, calling for an exercise of this Court's power of supervision?

Was the appeals court affirmance a decision that conflicted with this Court's decision in Liljeberg as to judicial disqualification issues?

Is such procedures and conduct a violation of a party's constitutional rights to due process?

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OPINIONS BELOW

The Eleventh Circuit Court of Appeals opinion sought to be reviewed was a per curiam Rule 36 non-published affirmance without written opinion decided on December 19, 1988, with rehearing denied on February 1, 1989. The Plaintiff had filed two different notice of appeals from different orders of the district court, and the appeals were consolidated. The Plaintiff-Petitioner sought review of all orders issued ih the district court. A "screening" panel of thè Eleventh Circuit partially screened the first appeal, but petitioner filed comprehensive briefs when the appeals were consolidated, as the panel assigned the case could have found "complete" jurisdiction. One of the issues herein involves the conflict between a screening panel and the final panel that hears the case.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 19, 1988. The Eleventh Circuit denied Petitioner's Suggestion of Rehearing In Banc and Petition for Rehearing on February 1, 1989. Extention to petition granted through June 1,1989 by Justice Kennedy. This Court's jurisdiction is invoked under 28 U.S.C.1254.

FEDERAL STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

F.R.App. P. 4

F.R.Civ. P. 4,11,55,59,60

Commodities Exchange Act 28 U.S.C.1331

28 U.S.C.455

Ethics Law 28 U.S.C App 301

United States Const. 5th Amend. due process

6th amend. & Art. III, VII

Code of Conduct for United States Judges

STATEMENT OF THE CASE

Beazley filed a pro se complaint at the district court public filing counter in Atlanta against Merrill Lynch Futures,Inc. (Merrill Lynch) under the Commodities Exchange Act (CEA) and state common law.

The civil action asked for $13,000 in actual damages and $1,235,000,000 punitive damages. Defendant acknowledged notice and service on form 18-A after Beazley mailed the papers to the agent for service of process. The form 18-A was signed and mailed to Beazley from Defendant's house counsel, the litigation department of Merrill Lynch, Pierce, Fenner & Smith,Inc. (MLPF&S) in New York City, whereupon it was filed by Beazley with the clerk as a return of service. Merrill Lynch failed to answer timely, and Beazley waited for another 20 days without any answer or contact. Finally, Beazley complied with FRCP 55 and by affidavit requested default

judgment. The clerk submitted the request to the "permanent" elbow law clerk of the judge assigned the case, who had other cases against Merrill Lynch and knew the local defense counsel of Defendant. Rather than issue the default judgment as the Court normally does, the law clerk did ex parte telephone the local counsel, a high profile member of the Federal Bar Association. That day a "show cause" order was signed by the judge and mailed to Beazley and local counsel, although Beazley was not notified of the ex parte call.

Local counsel filed a "Motion to Open Default" with the affidavit of a MLPF&S employee-attorney alleging excuses of "unintentional clerical oversight" in defendant's default saying he was traveling all but the first five days in which to have answered. He claimed his secretary "misfiled" the complaint, and that he had called Beazley's answering machine during

the time to answer. Beazley responded to the out-of-time motion, requested a hearing, and denied that he had been called during the time to answer,but only after the Court had "tipped off" local counsel of the default request. Beazley suggested phone records of the completed calls to his phone machine was evidence house counsel could best prove as to when the calls were made.

The court would not conduct a hearing under FRCP 55 & 60 which would have given Beazley cross-examination of those involved in the default. Instead, the law clerk drafted an order that GRANTED the motion to open default by accepting house counsels contentions about failing to answer.

There is evidence that the judge then "signed off" on the order because it had photocopied onto it a yellow post-it note from the law clerk to the judge concerning the order. Beazley requested communication with the judge regarding an appearance of

impropriety. Rather than respond, the judge immediately issued his recusal order that was not requested. The order gave no reason for the recusal, but directed the case be reassigned. The prior orders of the judge were NOT VACATED.

Beazley immediately filed a stay motion before the second judge so an inquiry could be made as to the partiality regaring the prior default procedure. The second judge called the parties to a hearing, but did not tell the parties that he had disclosed a liability in excess of $10,000 of his wife's in a margin account with the parent corporation of defendant, on his financial disclosure forms. The second judge harshly DENIED Beazley a stay,and under the strict comity custom, told Beazley that the prior judge's default opening was "law of the case", but Beazley could file new motions. The second judge ordered that a certificate of interested persons be filed forthwith.

The second judge extended discovery and required the case move along on the normal schedule, as if no problem existed. Beazley renewed his default motions before the second judge, but complied otherwise with the case management papers the court had required. The second judge called a "Rule 16" conference but began by casually mentioning that his wife had an account with MLPF&S, but that it did not matter one "IOTA". He failed to mention the margin account liability in an amount that required it be disclosed on the disclosure documents. There was no mention of the waiver requirments of disqualification law or the written waiver mandates of the Code of Conduct. Unaware and intimidated, Beazley was in no position to object. The judge said that he was busy with other matters and would not rule on the pending motions, and would extend discovery if the motions were not decided before expiration.

Beazley filed a formal request for production of the phone records. A week before the phone records production deadline, the Court harshly denied Beazley's motions, implying him an ambusher and sandbagger. The judge ordered the case for immediate trial in less than 30 days, ruled that discovery time had expired, and ordered Beazley comply with Defendant's discovery which Beazley was resisting as to not waive the default issues. Defendant would not produce the phone records. Facing trial without merit discovery, and new sanction motions for resisting discovery, Beazley announced a settlement at a pre-trial conference the judge called, but a dismissal was not stipulated. The judge said he had forgot about discoverty extention, and would await the settlement paperwork. Instead, the judge dismissed the case that day, and called another conference when Beazley inquired about

the dismissal. The judge indicated that Beazley could move the Court to set aside the dismissal, if he felt mistakes had been made. Beazley filed a motion suggested by the judge, but not within the 30 final order time but expressly within the Rule 59 10 day requirement so as to poll appeal time under FRAP 4. s an extra precaution, Beazley filed a FRAP 4 motion to extend appeal time, before the 30 day expiration.

The Court not only denied Beazley relief, it denied the appeal extention motion as improperly brought. Beazley moved for reconsideration and subsequently filed a notice of appeal.

The Eleventh Circuit's policy of jurisdictional screening, held that Beazley's appeal was untimely as to the dismissal order, but timely as to the order denying the set aside 10 day motion. Beazley did not get the Rule 59 toll, and the Court said jurisdiction could not "carry with

the case". Beazley's timely request in district court to extend appeal time until after the set aside motion was decided was not reviewed by the screening panel. Faced with the deferential standard of review after being screened, Beazley thought of one final chance at discovering the truth, before the dismissal order became out of the one year FRCP 60 term of court.

Given the modern computer docketing of large corporations, it was virtually impossible for Merrill Lynch to have failed to answer through unintentional clerical oversight. Beazley noticed an unusual number of staple holes in his original complaint in the record, as if it had been unstapled and restapled for copying. Beazley remembered that receipts are kept when copies of a complaint are purchased from the clerk, so Beazley obtained all the receipts issued by the clerk during the time his complaint could have been

answered. Beazley made the shocking discovery that local counsel had bought a copy of Beazley's original complaint and file,three days after the New York litigation department of MLPF&S had signed the acknowledgment of service. Beazley confronted local counsel saying that he knew more had happened that defendant has said. Beazley was asked to leave their offices, and Beazley showed the judges deputy clerk the receipts and requested communication with the Court regarding'the defendant's misrepresentation and lack of factual candor. Upon seeing the receipt, the judge said he could only act on a written motion. Beazley filed a FRCP 60 misrepresentation and fraud motion the day before the one year term of court for Rule 60 relief was about to expire. Beazley moved the appeals court to stay the appeal until the fraud motion was decided. The judge issued an order setting Beazley's motion for hearing.

The judge,in the order,told defendant that Beazley had found the receipt. Beazley did not receive the response to the motion until the morning of the hearing, and therefore Beazley requested that he be allowed to go foward without opening defendant's reply so that Beazley could show that he thought of all possibilities as to why local counsel would have purchased his complaint from the clerk. Beazley correctly anticipated that local counsel would say that they read the county legal paper's publication of "new cases filed". Nevertheless, there was some reason a copy was obtained. Local counsel gave an affidavit in defendant's response wherein he stated that he did in fact call house counsel about Beazley's case on the fifth day of the five days that house counsel had already swore he was not traveling. Despite local counsel's back-up call to house counsel as a procedural safeguard against default, local

counsel was not retained to answer, nor was "service of process" mentioned. The judge found no inconsistency in house counsel's original affidavit and the new affidavit given by local counsel after Beazley had found their receipt of his complaint. Beazley informed the court that he wished to reply by brief to their response just received to his relief motion. The court ruled against Beazley without picking up the already filed reply from the clerk, so Beazley moved for reconsideration.

It was then that Beazley discovered for the first time about the margin account liability on the judge's finacial disclosure documents, because the local legal paper published a summary of the financial interests required by the law to be listed. After verifying the information and researching 28. U.S.C 455, Beazley immediately filed a handwritten recusal motion. At the same time, defendant was filing a

Rule 11 sanction motion against Beazley, wherein they requested a hearing on the sanction motion with the judge. The judge granted Beazley's reconsideration motion, but denied Rule 60 fraud relief.

The judge denied Beazley's recusal motion by holding that a margin account of over $10,000 listed on financial disclosure documents, was not a financial interest requiring recusal/disqualification, but was merely a debt like a charge account. In a clearly erroneous finding of fact, the judge held that he had told Beazley about the margin account, when the transcript shows he just said account.

Finally, the judge sanctioned Beazley $2500 for filing the motions, holding that they were not objectively well founded in law and in fact, after reasonable inquiry and investigation. Beazley filed a response for the record on appeal, because the judge threatened contempt

fines if further motions were filed.

Beazley had not responded to the sanction motion because of the pending reconsideration motion to consider his reply to defendant's response to Beazley's Rule 60 misrepresentation/fraud motion. The court sanctioned Beazley in the same order that finally denied his "sanctionable" fraud motion. Beazley was not given any notice of the court's inclination to sanction him so as to permit Beazley to prepare a response and request a hearing so as to answer questions. The recusal motion was pending also, and Beazley did not want to waive disqualification issues by responding until it was necessary to respond, because Beazley may have prevailed on recusal,or reconsideration that was granted.

Beazley filed a second notice of appeal, and the Eleventh Circuit upon motion, consolidated the two appeals. After briefing, oral argument was granted.

Before oral argument, the Supreme Court of the United States decided Liljeberg, which Beazley cited during argument. The panel denied Beazley's attempt to file a brief of supplemental authority as a result of Liljeberg. The appeals court issued a Rule 36 non-published affirmance per curiam without opinion. Beazley's petition for rehearing of the December 19, 1988 affirmance was denied on February 1, 1989.

EXISTENCE OF JURISDICTION ORIGINALLY

The federal jurisdiction in the district court was statutorily authorized under the Commodities Exchange Act, 28 U.S.C.1331

Beazley had a choice of dispute resolution forums including arbitration, the reparations procedures of the Commodity Futures Trading Commision, and Federal Court private cause of action.

Beazley had rejected arbitration when his account was opened, so there was not any binding arbitration. (McMahon/Rodriguez)

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari in this case considering that there are any number of special and important reasons therefor, one of which is this Court's power of supervision over a case that has departed from the accepted and usual course of judicial proceedings.

1. The judge that was reassigned the case was disqualified per se and should have never accepted the assignment. He had been listing MLPF&S on his disclosure forms for a number of years under the Ethics Law,28 U.S.C. App.301. This was because his wife had a large margin account liability which was required to be listed if it exceeded $10,000.

Notwithstanding, he set a hearing on Beazley's stay motion and made substantive rulings. This was without disclosing the interest to Beazley or getting a waiver that is required to be in writing and

signed outside the presence of the judge under the Code of Conduct. Congress enacted 28 U.S.C.455 in the post-Watergate era of ethics examination. Some financial interests were per se disqualifications. Others were waivable after full disclosure of the interest. The Code of Conduct includes a form for obtaining an "informed" waiver. When the judge held the first hearing, he seemed very concerned that the Certificate of Interested Persons had not been filed by Merrill Lynch. After it was filed, and listed MLPF&S as a parent of defendant, and this was the same MLPF&S listed on the judges ethics forms, then recusal should have been automatic. The same corporation on both disclosure forms and the Certificate of Interested Persons, signals recusal/ disqualification. The judge did give Beazley a belated partial disclosure but this was the very thing the statutes were

enacted to prevent. In addition, the judge only told Beazley of an account when his disclosures indicated a margin account. Yet, he denied recusal by holding that he told Beazley of the margin account. This is evidence that the judge may not have understood the extreme difference between a regular stock brokerage account and a margin account that has equitable features because the broker lends money to a customer to buy stock collateralized by the 50% cash payment the customer usually puts up, and the broker usually keeps the stock in it's own name and counts it as its assets.

The ethics /disqualification laws do not limit disqualifications to parties that the judge owns stock in, but defines a financial interests in <u>para materia</u> with the disclosure document rules as to large liabilities. The October market crash allowed brokers to liquidate customers accounts and not other customers at the

whim of the brokerage corporation.

Another reason for disqualification is that MLPF&S house counsel acted as house counsel for the subsidiary defendant. Once Beazley discovered that this MLPF&S had not been candid in its default excuses, then the judge was,at that point,ruling on the conduct of the actual corporation he had listed on his disclosures.

Finally, Liljeberg v. Health Services Acquisition Corp., 198 S.Ct. 2194(1988) was held by this Court to show that Beazley's post-judgment recusal motion filed when the problem was discovered, was not such a bizare effort by Beazley, as the Courts below seem to have considered. It is as if the Eleventh Circuit when first cited Liljeberg at oral arugument had already decided Beazley's case and were not going to follow Liljeberg, even though the Supreme Court and the Fifth Circuit heard the case a couple of times before deciding. Federal courts are not following Liljeberg.

Liljeberg requires VACATUR of a judges orders if impartiality can be reasonably questioned, regardless of what the judge himself may feel. This Court approved the procedure of having another judge decide a disqualification motion as was done by the Fifth Circuit in Liljeberg.

Another judge should always hear such motions because at the end of the disclosure form filed by a judge, he signs a statment to the effect that he has not taken cases where he is disqualified under the statutes. How could a judge impartially decide a recusal motion where he has already signed a statement that he will not have to recuse? The decision should be de novo by another judge, without any interests whatsoever.

Beazley was not given any type of hearing on the recusal motion, and the judge considered the motion in sanctioning Beazley. Recusal motions are best decided by disinterested uninvolved judges.

2. Sanctioning Beazley for filing a fraud motion as a result of house counsels documented misrepresentations was not warranted. Rule 11 was not intended to chill criticism of attorney conduct, or judicial conduct. Beazley's case is one that should have required a hearing, although hearings are not required in all Rule 11 cases. It is suggested that what should be required in Rule 11 cases is that the judge find "probable cause" to consider a sanction. Once the party is informed of the Court's inclination, then a response and /or requests for a hearing could be fashioned. The delicate sensitivities in Rule 11 lend themselves to the question/answer hearing process. The judge sanctioned Beazley because he assumed the sanctionable motion was filed without reasonable inquiry, without considering that the one year term was about to expire. Of course, Beazley's

motion was not based upon conclusory allegations, for Beazley had obtained evidence to make a prima facie showing, which would have allowed his default inquiry to be properly examined as the law required anyway. Unfortunately for Beazley,his case contained judicial conduct that was not a fair fact finding process,or a fair application of the law.

Beazley's Rule 60 fraud motion was in good faith because he had consistently questioned the reasons given by defendant in failing to answer, and was denied the opportunity by the Court. Some circuits have considered the good faith "defense" to Rule 11. The Seventh Circuit has held in securities cases that to award attorney fees in rule 11 a showing of subjective bad faith was required. Suslick v Rothchild Securities Corp.,741 F.2d 1000(7th Cir.1984) Gieringer v. Silverman, 731 F.2d1272 (1984) The Supreme Court could accept Beazley's case for its first Rule 11 construction.

3. The Supreme Court long ago held that attorneys would be held to a higher standard,and relief should be granted a party who was prejudiced by attorney involvement in misrepresentation to a court. In the landmark case of Hazel Atlas Glass v Hartford Empire Co., 322 U.S.238, 64 S.Ct. 997, 88L.Ed. 1250 (1944) Justice Hugo Black's opinion vacated a judgment obtained by fraud when an attorney ghostwrote a trade journal article as a disinterested expert relied upon in the trial. Most Courts when confronted with information-withholding and inconsistent testimony grant relief when attorney conduct is involved, as long as the motion is filed within a year of the judgment under the term rule of FRCP 60, although fraud upon the Court can be heard at any time.

The is a trend to find a duty of factual and legal candor as a result of Rule 11 pleading requirements, for failing

to disclose. The Eleventh Circuit embraced a duty of factual candor and held it was a breach of Rule 11 in failing to disclose. Blackwell v. Dept. of Offender Rehabilitation, 807 F.2d 914, 915-16 (11th Cir.1986) The new ABA Rule 3.3 eliminates attorney-client confidentiality as a reason for non-disclosure. The Supreme Court could adopt Rule 11 nationwide as requiring a duty of candor in court rather than the old-style false impression nondisclosure.

The problem in Beazley's case is that the judge and law clerk gave the defaulting defendant the opportunity of nondisclosure in the ex parte call and the show cause approach. It must be remembered that when the law clerk informed local counsel of Beazley's default request, local counsel had already obtained Beazley's complaint from the clerk of court, and already had called house counsel about the case. This was the same law clerk who wrote

the order opening default with the post-it note attached. This was a five-year clerk.

4. After Beazley filed the first notice of appeal, the Eleventh Circuit staff attorneys office screened the case and a screening panel partially screened the appeal holding that the motion to set aside the dismissal was timely but not the dismissal itself. Beazley had specifically filed his post dismissal motion within 10 days of the judgment of dismissal. He filed a appeal extention motion within 30 days of the dismissal. Yet the appeals court screened his case against this Court's holding in Forman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222(1962) Recently in an Eleventh Circuit case, this Supreme Court held a 10 day post judgment motion tolled appeal time and negated an earlier appeal in Osterneck v. Ernst & Whinney, 109 S. Ct. 987 (1989).

The policy reasons outlined in Osterneck applied in this case herein. Justice Kennedy reasoned that the appellate court should have the benefit of a complete record after the district court has had the opportunity to correct mistakes.

Given the highest per capita caseload of any circuit, it could be argued that the staff is tempted to screen a case under any possible catch-22 circumstances. Osterneck was untimely filed by appealing too early after a 10 day motion, and Beazley who likewise had a 10 day motion was too late . Beazley even lost a safeguard appeal extention he timely made.

Beazley's approach of trying to get the district court to correct errors is the better policy under Rule 59 and the judicial economy of avoiding appeals.

This is the policy of Osterneck.

5. When the first judge's law clerk telephoned local counsel, this ex parte contact was a violation of the Code of Conduct as to impartiality. It should not be assumed that the law clerk made the contact absent instruction from the judge. The judge "got rid" of Beazley with the unrequested recusal giving no reasons, and not vacating the default opening order. Under Liljeberg, if the judges impartiality can be questioned, and there is an appearance of injustice, then this judges orders should have been vacated.

The show cause approach was a manifest disregard for the default law and a violation of due process in disallowing Beazley a fair chance at fact finding at a hearing, and not requiring Defendant to meet the higher standard of Rule 60 relief in setting aside a default judgment that Beazley was entitled to at that time.

6. Rarely does a case develop as this case did, because corporate defendants rarely unintentionally default. Beazley believes that it is possible that the reason an answer was not timely served and filed is because house counsel may not have known about the acknowledgment because Beazley mailed the required two form 18-A's leaving one still in the file when it was assigned to house counsel after the MLPF&S litigation clerk signed the one form 18-A. Likewise the stamped self addressed envelop included was not used in mailing the form back to Plaintiff. The statute of limitations was expiring and defendant may have been waiting to see if Beazley would suffer the 120 day dismissal if a process server was not used. There was no proof of service in the clerk's file when local counsel purchased. This assumes house counsel thought the decision to acknowledge was his yet to make.

Beazley gave Merrill Lynch a self imposed 20 day courtesy extention before requesting default judgment. It was out of time for a Motion to Open Default to be filed, and the only reason it happened is that the Court called up local counsel because the court knows who represented defendant. How about all the defendants who suffer default judgment when the court does not know who represents them if anyone? The proper procedure was to grant some type of default judgment and require defendant to meet the burden under FRCP 60 to have the judgment set aside. Add to this the post it note , the recusal, the financial interest issues of the second judge, and the lack of candor as to the default, the sanction of Beazley, the appeal screening,--- the result is a departure from the usual course of judicial proceedings calling for this Court's supervision. Beazley did not cause these

problems. Beazley simply wanted his case to follow the law under the status defendant put it in, but the Court did not want to resolve the genuine issue of fact concerning the default,under the fair application of the law of defaults. Without impartial judges and candid attorneys, any chance at equal justice for a pro se Plaintiff can only be achieved under this Court's supervision. In Peralta v. Heights Medical Center, Inc.108 S.Ct. 896 (1988) this Court reviewd the special considerations as to default judgments under state law, yet this court recognized the validity of default judgments that comply with due process, such as notifying the defaulter that a judgment has been issued in time to respond. Although a decision on the merits is desirable, the recent trend is that a party that failed to answer must show what backup procedures were in place and offer acceptable excuses as to how the minimum

procedural safeguards may have failed. A case of proper application of default law was Park Corp. v. Lexington Insurance Co.812 F.2d 892 (4th Cir. 1987) wherein a mail receipt was signed by a non-attorney to accomplish service. Then a default judgment was granted under Rule 55, and the court held that the house counsel must show back-up procedures and denied the defendant relief. This is the current law in the Eleventh Circuit as held in Gibbs v. Air Canada, 810 F.2d 1529 (11th Cir) holding that the test is "minimum procedural safeguards" and not "willfullness" as the trial court applied in this case below herein.

Actually, Beazley has even shown a degree of willfullness in that house counsel did not retain local counsel to answer on the last day before leaving town for the the remainder of the answer time. These issues of fact could have been decided by the judge after a hearing.

CONCLUSION

Merrill Lynch defaults and the judicial system has applicable rules for such a case status. But if those court officers do not go by the rules, then justice is not served or accomplished.

Liljeberg and 28 U.S.C 455 per se disqualifications, along with codes of conduct show that Beazley was not the party in violation of Rule 11, because the party that is critical of lack of candor should not be sanctioned as opposed to the counsel that breached the duty.

A multifacited case as Beazley's only surfaces about every 50 years, although tribunals are misled everyday. Day to day justice can be better achieved by certiorari being granted herein, and this Court making candor by attorneys binding in all federal courts. The judicial branch of goverment should set the ethics example.

Ben W. Beagle

AFFIDAVIT OF SERVICE

I, Ben W. Beazley, do hereby state ,after being duly sworn that I have this day served counsel of record for Defendant respondant with this petition for Certiorari by mailing first class with adequate postage thereon by depositing same in U.S. Postal Service mailbox addressed as follows.

Rogers & Hardin
Paul W. Stivers, Esq.
2700 Cain Tower
229 Peachtree St. N.E.
Atlanta GA 30303

I have done this in compliance with the Rules of the U.S.Supreme Court Rule 28.3 Et. Seq.

This 31 day of May, 1989

Ben W. Beazley

Ben W. Beazley
Petitioner Pro Se

Sworn to and subscribed
before me this 31 day of May, 1989.

Notary Public

Notary Public, DeKalb County, Georgia
My Commission Expires June 9, 1992

88-1963

No. _____

Supreme Court, U.S.
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Defendant-Respondent

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APPENDIX

Ben W. Beazley, Pro Se
Plaintiff-Petitioner

3286 Wake Robin Trl.
Atlanta, GA 30341

(404) 939-8264

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8812

BEN W. BEAZLEY,

Plaintiff-Appellant

versus

MERRILL LYNCH FUTURES, INC.,
f/k/a MERRILL LYNCH COMMODITIES,
INC.,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District Of Georgia

Before GODBOLD, VANCE and JOHNSON, Circuit Judges.

B Y T H E C O U R T:

The Court has sua sponte questioned its jurisdiction to enterain this appeal, Appellant's November 3, 1986 notice of appeal is untimely as to the June 2, 1986 order of dismissal,but timely as to the August 13, 1986 order denying Fed. R.Civ. P. 60(b) relief. Fed. R.App. P.4(a) (4). Therefore this court has jurisdiction to o review the Rule 60(b) denial, but not

the underlying order of dismissal.

Glass v. Seaboard Coast Line Railroad Co., 714 F.2d 1107,1109 (11th Cir. 1983).

U.S.Court of Appeals
Eleventh Circuit
F I L E D
March 2, 1987
Miguel J. Cortez
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 86-8812 & 87-8640

D.C. Docket No. 85-2491A

BEN W. BEAZLEY

Plaintiff-Appellant,

versus

MERRILL LYNCH FUTURS, INC.,
f/k/a MERRILL LYNCH COMMODITIES,
INC.,

Defendant-Appellee

Appeals from the United States District Court
for the Northern District of Georgia

(december 19, 1988)

Before FAY and KRAVITCH,Circuit Judges,
And LYNNE*, Senior District Judge

PER CURIAM: AFFIRMED. See 11th Cir. R.36-1.

*Honorable Seyborn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-8812
87-8640

F I L E D
February 1, 1989
Miguel J, Cortez
Clerk

BEN W. BEAZLEY,

Plaintiff-Appellant

versus

MERRILL LYNCH FUTURES, INC.,
f/k/a
MERRILL LYNCH COMMODITIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District Of Georgia

ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING IN BANC

Before FAY and KRAVITCH, Circuit Judges,
and LYNNE*,District Judge

Per Curiam:

The petitions for rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestions of Rehearing In Banc are DENIED. ENTERED FOR THE COURT
Peter Fay, United States Circuit Judge

IN THE UNITED STATES DISCTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEN W. BEAZLEY,	CIVIL ACTION
Plaintiff,	NO. 85C-2491
vs.	
MERRILL LYNCH FUTURES, INC. f/k/a MERRILL LYNCH COMMODITIES, INC.,	
Defendant.	

O R D E R

It appearing that the defendant's registered agent was served with the complaint and summons in this case on April 15, 1985, and that no answer or responsive pleading has been served within the time allowed by law, the parties are hereby notified that the court will act on the plaintiff's request for the entry of default judgment 15 days following the filing of this order.

SO ORDERED, this 5th day of June,1985.

/s/(first judge)
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PARTIAL AFFIDAVIT OF PAUL W. STIVERS [1].

5.

Rogers & Hardin first learned of the fact that Mr. Beazley had filed a Complaint against Merrill Lynch as a result of our daily review of the Fulton County Daily Report. The April 12, 1985 edition .... indicated that the case had recently been filed...We regularly review the ..Report for cases that involve our existing clients one of which is Merrill Lynch.

6.

Upon discovering that an action had been filed against Merrill Lynch...we obtained this copy on April 18, 1985...

1. This is the local counsel that the permanent law clerk of the first judge called after Beazley requested default and judgment. The affidavit covers the time before the law clerks call in 1985, although the affidavit was given in opposition to Beazley's fraud motion two years later in 1987.

When I called Merrill Lynch's New York offices on April 19,1985, I was informed.. that the file was assigned to Paul Lieberman, Esq. in Merrill Lynch's Legal Dept. I then spoke briefly with Mr. Lieberman about Mr. Beazley's action. Mr. Lieberman stated that he already had a copy of the Complaint. Mr Lieberman, did not tell me, and I did not know, the date when Merrill Lynch had been served the complaint.

11.

On June 5, 1985 we were notified by Judge _____'s law clerk that Merrill Lynch had not answered the complaint in this case, that Mr. Beazley had moved for entry of default, and that the court was going to enter an order that it would act upon this request in fifteen days.

.....

Paul W. Stivers

Sworn to July 1, 1987.
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PARTIAL AFFIDAVIT OF PAUL A LIEBERMAN[1]

1.

I am assistant vice-president and counsel of Merrill Lynch, pierce, Fenner & Smith, Inc., the parent of Merrill Lynch Futures, Inc.,("Merrill Lynch"), defendant in this action...

2.

On April 15, 1985, Merrill Lynch received a complaint... from registered agent in Georgia. The same day Jean B. Sinatro of our legal services unit immediately returned the "acknowledgement of Receipt of Summons and Complaint", which accompanied the complaint.... The complaint was thereafter foewarded to me.

1. This was defendants house counsel's affidavit giving the reasons for the default after the law clerk called their local counsel about Beazley's default request. This was the only "recorded" information upon which the law clerk based his order that the judge signed. Beazley's request for a hearing was ignored.

3.

I am an attorney employed by Merrill Lynch,Pierce, Fenner & Smith, Inc. ... My caseload has increased significantly in the past few months as a result of reassignment of matters due to the departure of three attorneys from the litigation section of Merrill Lynch's legal department.

6.

I traveled extensively during the period of time in which the answer was to be prepared...Of the 20 days allowed to answer a complaint, I was out of the office all but the first 5 days.

7.

As a result of this combination of events, an answer was not filed...the date it was due. I did not realize this oversight until a law clerk in your office informed Rogers & Hardin, Merrill Lynch's outside counsel in Atlanta, Georgia, that a motion for default had been filed. Upon learning of this motion, I immediately instructed Rogers

& Hardin to prepare an answer, to move to open the default, ...

8.

The failure of Merrill Lynch to file a timely answer or other response to the complaint was not intentional, or the result of bad faith, wilfulness or arrogance. It was simply a mistake caused by the breakdown of an internal system and travel necessitated by other professional commitments.

Paul A. Lieberman

Sworn to ...this June 18, 1985
Notary Public State of New York

2. It was on this "fifth day" April 19,1985 that Mr. Lieberman was called by Mr. Stivers and was not retained to answer, yet Mr. Lieberman was not scheduled to return from his travels after that fifth day,in time to timely serve and file an answer.

Once the law clerk called Mr.Stivers about the default, he called Lieberman, and it was then that Lieberman called Beazley's answering machine. This is why the telephone records that Beazley requested to be produced are crucial to the truth.

These records were due for production deadline around May 15 yet the second judge ruled against Beazley's default motions on May 7, the week before.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY VS. MERRILL LYNCH FUTURES, INC.

O R D E R

On May 31, 1985, after the defendant had failed to serve an answer or other responsive pleading, the plaintiff requested that the clerk enter a default and a default judgment against the defendant. On June 5, the court notified the parties that it would act on the plaintiff's request for entry of default judgment 15 days following the filing of that order. On June 19, the defendant filied its answer and also filed a motion to open default. (The clerk did not make an entry of default immediately following the May 31 request but waited until August 9. This delay was apparently because the clerk had referred this case to the undersigned judge for guidance because of the amount of damages requested.

The Court will consider the clerk's August 9 entry of default to be nunc pro tunc May 31 and will consider the defendants motion to open default as responsive to that entry of default.)

The defendant acknowledges that it did not serve a timely response to the plaintiff's complaint. Paul A. Lieberman, Assistant Vice President and counsel of Merrill Lynch, Pierce, Fenner & Smith,Inc., the parent company of Merrill Lynch Futures Inc., by affidavit stated that on April 15, 1985. Merrill LYnch received the complaint in this action from its registered agent, CT Corporation, and that a person in Merrill Lunch's legal services unit immediately returned the acknowledgment of receipt of summons and complaint the complaint was thereafter fowarded to Mr. Lieberman. In his affidavit he states that he twice tried to contact the Plaintiff in the action and left messages on

the plaintiff's answering machine asking that his calls be returned but that Plaintiff never returned those calls. He further states that the temporary secretary who was assigned to work with him during the absence of his regular secertary mistakenly removed the case file from his active file and placed it in a file cabinet with other files. He further states that he traveled extensively during the period of time in which the answer was to be prepared. It was because of the misfilings and of his travels that a timely response was not served.

After reviewing the documents in the record, this court finds that Merrill Lynch's failure to answer the complaint was not willful, that the defendant has a meritorious defense, that the defendant acted promptly when the default was called to his attention, and that there will be no legal prejudice to the palintiff if the

entry of default is set aside. See Rasmussen v. W.E.Hutton & Co., 68 F.R.D. 231 (N.D.ga. 1975).

For the foregoing reasons, the court will exercise its discertion and set aside the clerk's entry of default. The defendant is directed to pay to the plaintiff $150 as reimbursement for the time and effort expended in seeking the entry of default and in responding to the defendant's motion.

SO ORDERED, this 9th day of September,1985.

/s/ first judge
United States District Judge

Judge,
I included the provision about reimbursing the plaintiff because this is something the defendant offered to do.
AW

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES INC.

O R D E R

The plaintiff's motion for reconsideration and certification pursuant to 28 U.S.C. 1292(b) having been read and considered, the same is hereby DENIED.

SO ORDERED this 15th day of October,1985.

/s/ first judge
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES INC.

O R D E R

The undersigned judge does hereby recuse himself from further consideration of this case. The clerk is directed to assign this case to another judge pursuant to the routine assignment of cases by rotation.

SO ORDERED, this 30th day of December, 1985.

/s/ first judge
United States District Judge

Financial Disclosure Report 5--8-86

VI. Liabilities

Description

(Spouse)Merrill Lynch Pierce, Fenner & Smith- margin account

Amount in thousands of dollars				
10 to 15	15 to 50	50 to 100	100 to 250	250 to
	X			

In compliance with the provisions of 28 U.S.C 455 and of Advisory opinion No. 57 of the advisory committee on Judicial Activities...I did not perform any adjudicatory function in any litigation during the period covered... which my spouse had a financial interest as defined by Canon 3C(3)(C), in the outcome of the litigation.

Signature /s/ second judge Date May8,1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES INC.

O R D E R

Presently before the court for consideration is plaintiff's motion for a protective order. Defendant had attempted to take plaintiff's deposition and also had submitted interrogatories and requests to produce. The court held a hearing on January 8, 1986, with plaintiff, who is proceeding pro se, and counsel for defendant present.

Upon review, the court grants plaintiff's motion for a protective order up to and including January 21, 1986. Plaintiff shall have until that date to answer interrogatories and requests to produce which defendant has proffered and from which plaintiff seeks protection. At the hearing the parties agreed that they would attempt to set a time for the deposition. Additionally,

the court extends discovery until April 15, 1986. The court also notes that the parties have not filed the certificate of interested persons, the preliminary statement, and the settlement certificate. They are instructed to do so immediately. Although he is proceeding pro se, plaintiff has represented to the court that he is an attorney licensed in Georgia and in this court. He shall be treated as one.

IT IS SO ORDERED this 14th day of January, 1986.

/s/ second judge
United STates District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES INC.

O R D E R

Presently before the court are the motions of plaintiff for reconsideration of protective order, to set aside order opening default, for default judgment, and to correct errors by the clerk of court's office, and defendant's motion to compel. Through his motions plaintiff essentially seeks a trial by ambush. Such tactics are no longer sanctioned in federal court, however, and this court will not permit plaintiff to win his case by sandbagging his opponents.

A recitation of this action's precedural background is necesssary for a thorough discussion and analysis. On April 10, 1985, plaintiff filed his complaint, alleging violations of various federal and state securities laws. He requested

damages in the amount of $1,235,013,000.00 approximately $13,000.00 of which he claimed as actual damages. Plaintiff filed the lawsuit pro se; he is an attorney licensed to practice in Georgia.

The acknowledgment of service was signed on April 15, 1985, and filed on May 21, 1985. No answer was filed. On May 31, 1985, Plaintiff filed his request to the clerk for entry of default and judgment. He included an affidavit which stated that he had mailed the complaint and summons to defendant's agent for service in Georgia, and had received no answer.

The clerk did not make an entry of default immediately but referred the matter to the assigned judge, the Honorable _(first judge)_ for determination. This action was taken because of the large amount of damage sought.[1] On June 5, 1985 Judge _____ entered an order notifying the parties that the court would act on plaintiff's

request for default judgment 15 days after entry of the order.

On June 19, 1985, defendant moved to open default. It claimed that its failure to file an answer was due to excusable neglect. It admits that its in-house counsel, Mr. Lieberman, received the complaint. He attempted to get in touch with plaintiff by telephone, but could not. A temporary secretary assigned to him mislaid the file. Lieberman was out of town for most of the answer period. He was not aware that the answer had not been filed until a law clerk in the judges office informed defendant's local counsel in Atlanta of the motion for default. Lieberman then instructed local counsel to file an answer, move to open default, and offer to pay plaintiff's costs in connection with the default.(Affidavit of Paul A. Lieberman, Ex. A to defendant's motion to open default.)

Defendant included a proposed answer in

its motion to open default, in which it asserted its defenses. First, defendant refuted plaintiff's claim that he was unaware of risks inherent in trading commodities, submitting a letter which had been sent to plaintiff detailing the risks involved. Additionally, defendant submitted the affidavits of two of plaintiff's account executives, which stated that plaintiff understood the risks involved. The affidavits also pointed out that Plaintiff was aware of trades in his account and authorized all trades. (Affidavits of Ben Hofer and Don Maxey, Ex.B and C to defendant's motion.)

Plaintiff opposed defendant's motion, and filed and affidavit contesting some, but not all, of defendant's allegations. He also sought a hearing, apparently on his request for default judgment.

On September 9, 1985, Judge _____ granted defendant's motion to set aside

entry of default. The judge noted first that the clerk had not entered the default until August 8,1985, and that the date of default would be considered nunc pro tunc May 31, 1985. After reviewing the facts comprising the defendant's default, Judge _____ held that the failure to answer was not willful, that defendant had a meritorious defense, that defendant acted promptly to open default, and that plaintiff would not be prejudiced thereby. The judge also directed defendant to pay plaintiff $150.00 for time and effort incurred in connection with the default. On September 9,1985, the clerk stamped defendant's answer as "filed." [2]

Plaintiff moved for reconsideration and for a 1292(b) order. Defendant opposed the motion. On October 17,1985, Judge _____ denied the motion.

On December 23, 1985, defendant filed its notice to depose plaintiff. The deposition was scheduled for January 8, 1986. Judge

_____ recused himself from the action on December 30, 1985, On January 3, 1986, plaintiff moved for a protective order claiming that the past rulings were in error and must be corrected before the case could proceed. The court[3] held a hearing on January 8, 1986, with plaintiff and defendant's counsel present. The court entered an order granting the protective order until January 21, 1986, and extending discovery until April 15, 1986.

Plaintiff filed the instand motions thereafter. On January 31, 1986, defendant moved to compel. At Plaintiff's request, the court held a settlement conference on March 7, 1986. The parties indicated that they could assess settlement possibilities better after the court's ruling on the pending motions.

Although he has proffered myriad motions under different headings, plaintiff basically seeks a default judgment to which he believes

himself absolutely entitled. The court first will discuss plaintiff's motions to set aside Judge _____'s Septemebr 9, 1985 order and for default judgment. Once the court decides these motions, the other motions will be resolved more easily.

Plaintiff contends basically that his reauest for a default judgment should have been granted immediately, whic would have happened if Judge _____'s law clerk had not contacted defendant's counsel. Additionally, the judge should not have given defendant notice of the default, as he did in his order of June 5, 1985. If the judge or clerk had entered the default judgment instantly, defendant would have had to contest the default under Fed. R.Civ.P.60(b), a stricter standard.

Plaintiff's arguments are premised on an apparent misunderstanding of the law concerning entry of default and default

judgments. When a party against whom a judgment is sought fails to defend and the other party shows that fact by affidavit, "the clerk shall enter his default". Fed. R.Civ.P.55(a).Judgment by default may be entered by the clerk when the claim is for a sum certain. Id. 55(b)(1). When the claim is not for a liquidated amount, the court must enter judgment. Id.55(b)(2).

Entry of a default judgment is a drastic remedy, and should be used only in extreme circumstances. Turner v. Salvatierra, 580 F.2d 199,201 (5th Cir.1978); Charlton L. Davis& Co. v. Fedder Data Center Inc., 556 F.2d 308,309 (5th Cir.1977). The law does not favor default judgments. McKenzie v. Wakulla County, 89 F.R.D 444,445 (N.D Fla. 1981). Our systen of justice prefers resoulution of disputes on the merits. SEE Davis v. Parkhill Goodloe Co., 302 F2d 489,495 (5th Cir.1962). Any doubt whether to grant a default judgment should be

resolved in favor of a judicial decision on the merits. Blois v Friday, 612 F.2d 938 940 (5th Cir. 1980) When the amount claimned is not liquidated, judgment may not be entered until a hearing is held, or at least until a clera demonstration establishes the necessary facts. United Artist Corporation v. Freeman , 605 F 2d 854, 857 (5th Cir. 1979).

As the proceeding pronouncements of the law make clear, neith Judge _____ nor the clerk was required to grant plaintiff a default judgment immediately. First, the clerk could not enter a default judgment because plaintiff did not seek a liquidated amount. Plaintiff requested damages of approximately $1.3 billion dollars; on none of that sum did he present proof. The clerk correctly referred the case to Judge _____.

The judge was not required to enter a default judgment blindly, without deli-

beration . Given the favor shown to a trial on the merits, the law mandates a careful consideration of whether to enter default judgment. Blois, 612 F2d at 940. Additionally, a hearing or clear proof is necessary when damages a not a sum certain. In the case at bar, the damages were extremely high and unliquidated. Plaintiff did not present proff as to his damages. Plaintiff is not entitled to an automatic default judgment.

Plaintiff also complains that the judge should not have issued his order of June 5 giving notice of his intent to consider the request for default judgment. If a party against whon a default is requested has appeared in the action, he is entitled to written notice" of the application for judgment at least 3 days prior to the hearing on such application. An appearance is construed broadly and is not limited to a formal appearance. Any act that would

indicate that a party intends to defend c ould possibly constitute an appearance. Charlton L. Davis & Co., 556 F2d at 309 (letters and telephone calls tp plaintiff's attorney constituted an appearance).

In the instant case. defendant alleges that Lieberman tried to call plaintiff, but could not reach him. Plaintiff dispites this assertion. The docket does not indicate that defendant or its counsel made an appearance before Judge _____'s order of June 5. Under these limited facts, apparently defendant had not made an appearance. Thus, notice was not required.

Even though notice to defendant was not mandated, nothing in Rulr 55 or the caselaw forbids notice. In the case at bar, the judge gave notice to both parties of his intent to consider the application for default judgment. This approach was wise, consider ing the extremely large ampunt of damages sought. This notice was also sensible in

light of the established policy which favors trial on the merits.

Plaintiff repeatedly alledged that Judge _____'s law clerk improperly contacted defendant's local counsel to tell them of the default. No details on the alleged communication, such aswhen it occured, have been offered. This court does not imply that any contact which might have occured was improper. For purposes of the instant motion, the court believes that the contact did not make a difference in the proceedings. Whether it occured before or after Judge _____'s June 5 order is unimportant. the order was proper and gave notice. Contrary to plaintiff's assertion, the default judgment would not necessarily had been granted but for the alleged communication.

Notwithstanding his motion's headings, plaintiff really is asking this court to reconsider and overturn Judge _____'s

order. this court will not do so for a number of reasons. First, plaintiff already filed a motion to reconsider, which Judge _____ denied. The instant motions in essence ask the court to reconsider the denial of the motion for reconsideration. The local rules prohibit such a practice. LR220-6 NDGa.

Another improtant consideration is the law of the case doctrine. When a United States District Judge renders a decision and makes a judicial order in a case on his calendar, and the case is transferred to the calendar of another judge, the later judge should respect and not overrule the order. Gallimore v. Missouri Pacific RR Co., 635 F 2d 1165, 1171 (5th Cir.Unit A 1981). The above styled rule is a matter of judicial comity, and is not absolute. Id at 1172. The decision is within the court's discretion. Id. Departure from the rule would be proper if the interest of justice so require. ID. Significantly changed facts or circumstances

, such as a better developed record or a change in applicable law, could cause the second court to overrule the prior court's decision. Id.

Plaintiff does not assert that the law governing default judgments has changed. He alleges that new evidence has been presented, and that Judge _____ did not know "all that went on," which presumably means the alleged ex parte communication. This court is uncertain as to just what evidence is new. Nonetheless, this court has reviewed defendant's motion to open default and plaintiff's request for default judgment, and the entire file. With all the facts and information before it at present, the court would concur with Judge _____'s decision.

The court may set aside entry of default upon showing of good cause. Rasmussen v. W.E. Hutton & Co., 68 F.D.R.231, 233 (N.D.ga.1975). Action on a motion to set aside a default is within the court's discretion.

Robinson v. United States, 734 F.2d 735,739 (11th Cir. 1984). The court's discretion should be guided by the circumstances of the case Id. Factors relevant to the determination are whether the defaulting party acted promptly to vacate the default, whether he presented plasible reasons for the default, whether he asserted a meritorious defense, and whether the non-defaulting party will be prejudiced. Turner Broadcasting System, Inc. v. Sayno Electric, Inc., 33 B.R 996,1001 (N.D Ga. 1983)aff'd without opin., 742 F.2d 1465 (11th Cir. 1984).

In the case sub judice, defendant has fulfillec the requirements to set aside the entry of default. Defendant moved promptly to open the default when it realized that the action was in default. Additionally, defendant offered a plausible explanation for the default, which the court consideres to be excusable neglect.

Of course, the court does not condone such actions, but defendant's failure to answer clearly was neglectful and not willful.[5]

Defendant also presented a meritorious defense. Plaintiff claimed, inter alia, that he had been misled as to commodities trading. that trades had been made without his consent, and that his forms had been altered. Defendant filed affidavits of two account executives who worked with plaintiff, which dispute the contentions. The affidavits, and other evidence proffered by defendant, indicate that plaintiff was well-informed about the commodities market, that he authorized all trades, and that no forms had been changed. The court does not intimate at this point which side is correct, but notes that defendant has presented a meritorious defense for the purposes of this motion.

Finally, plaintiff will not be prejudiced by the opening of the default. A hearing on damages would have to be held at any

rate. The amount of damages sought is high, and no proff has been offered. Defendant also compensated plaintiff for time spent on the default.

The current delay is because plaintiff refuses to accept that he is not entitled to an instantaneous default judgment. In essense, plaintiff is trying to win his case by ambush. He apparently believes that litigation is a game, with victory to the quickest. Litigation today, however, should be premised as much as possible on the merits of the case. This court will decide a lawsuit on the facts and the law, and will not employ the"sporting theory of justice". Insurance Company of North America v. S/S hellenic Patriot, 87 F.D.R 136, 139)S.D.N.Y.1980). The court thus denies platiffs motion to set aside Judge _____'s order opening default and for default judgment.

Plaintiff also moves the court to correct errors of "omission and commission" by the

clerk's office. His concern apparently is with the entry on the docket of defendant's answer. The entry is dated September, 9, 1985, and that date is stamped on the answer. The docket entry, however, is between entries for October 23, and December 17, 1985. Plaintiff claims the answer should not be shown as filed.

Defendant's answer was filed with the motion to open default. On the same day that Judge _____granted the motion, the clerk's office stamped the answer. Apparently, the clerk's office did not doclet the answer on that date, but realized the error later and inserted the entry. The court will not change the docket. That the clerk's office stamped the answer as filed when the judge opened default was proper. Additionally, defendant re-served its answer on plaintiff. Thus, plaintiff has notice of defendant's defenses, and will not be prejudiced by leaving the docket sheet as it is.[6] The

court denies plaintiff's motion to correct errors.

Plaintiff further moves for reconsideration of the protective order. This motion is based on plaintiff's contention that he is entitled to a default judgment. The court has found that the default was properly opened. Thus, no reason exists for a protective.

Defendant has moved to compel. Of course, this motion is premised on plaintiff's refusal to respond or participate in discovery, which in turn is based plaintiff's insistence that he should have his default judgment. The court has ruled to the contrary, and plaintiff no longer has an excuse to delay discovery. The court grants defendant's motion to compel. Plaintiff is to comply immediately with defendant's discovery requests.

The court has expressed a desire to see this case proceed expeditiously, and the parties claim to agree. Yet, plaintiff has

caused months of delay by his unreasonable belief that litigation is a game which can be won by sandbagging the opponent. This court has endeavored to point out that the judicial system is based on trial by merits , not by ambush. Hopefully, plaintiff now realizes this, and the instant lawsuit will proceed swiftly and smoothly.

In summary, the court denies plaintiff's motions to set aside the order of default, for default judgment, to correct errors of omission and commission of the clerk's office, and for reconsideration of the protective order. The court grants defendant's motion to compel.

IT IS SO ORDERED, this 7th day of May,1986.

/s/ second judge

United States District Judge

1 See order of Judge ____, Beazley v. Merrill Lynch Futures, inc., No. C-85-2491-A, slip op. at 1 (N.D.ga.Sept 9, 1985); docket entry for May 31, 1985.

2 The docket entry was not entered until after October 23, and before December 17, 1985.

3 The case was reassigned to the undersigned judge on December 31, 1985.

4 The court is unsure of the exact nature or time of the alleged communication between the law clerk and defendant's local counsel. Assuming that some ex parte contact occurred, the court will not make a determination as to its propriety. Canon 3A (4) of the American Bar Association Code of Judicial Conduct provides that a judge should"neither initiate nor consider ex parteor other communications concerning a pending... proceeding." This pronouncement would apply to a judge's law clerk. See Environmental Defense Fund v. Alexander, 614 F.2d 474, 481-82(5th Cir. 1980)

Forbidden ex parte communications often are those in which some aspect of the litigation is revealed which is not in the public record. See id. An additional situation is one in which a judge or law clerk has gathered evidence or visited the scene of the event being litigated, and the judge uses this information in reaching a decision, without informing one or either side. Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593, 594-95 (5th Cir. 1977)(law clerk visited accident scene; was called to testify at trial; held improper ex parte communication); Price Brothers v. Philadelphia Gear Corp., 629 F.2d 444, 446-47 (6th Cir. 1980). court sent clerk to gather evidence without telling counsel; this destroys appearance of impartiality). In the instant case, the only facts which might have been communicated ex parte to defendant's counsel were that defendant was in default and that plaintiff was seeking a default judgment. These facts are a matter of public record.

Not every ex parte contact gives rise to the appearance of impropriety, or renders a trial or proceeding unfair. Power Authority of the State of New Yorkv. Federal Energy Regulatory Comm'n 743 F2d 93, 110 (2d Cir. 1984);

In re Corrugated Container Antitrust Litigation, 614 F.2d 958,968 (5th Cir. 1980)(law clerk gave interview concerning pending case which was a breach of the code. It was not enoughto disqualify judge. No opinion was expressed; a fact merely was stated. If impropriety appears, the proper remedy is recusal. Seeid at 967.

In the case at bar, this court does not intimate that any impropriety occured, or that the appearance of impropriety is present. If it had, the judge applied the correct palliative by recusing himself. This court has reviewed the record and concluded that it would reach the same result as did Judge _____ on the motion to open default. This court's review has removed any taint which could have arisen from alleged impropriety or the appearance thereof.

On Judge _____'s order of September 9, 1985, is a yellow note paper which indicates that the law clerk put in the order an award to plaintiff for the time and expense incurred. The note is not evidence of an ex parte communication; defendant offered in its briefs to reimburse plaintiff for its expenses.

5 Plaintiff disputes defendant's contentions, as he does its defense, with his own affidavits and other assertions. These allegations are not enough to require the court to disregard defendant's explanations and defenses.

6 Another error has occured in the handling of this case by the clerk's office. The clerk did not enterdefault upon plaintiff's request. Judge _____'s September 9, 1985 order dealt with this oversight by making the date of entry of the default May 31, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES, INC.

O R D E R

This court has before it for review and consideration the preliminary statement in the captioned case. The court on May 7, 1986 ruled upon certain motions in the case, including discovery. The court notes that the period of discovery expired on April 15, 1986. Defendant had attempted to accomplish discovery before that date; however, discovery was not forthcoming from plaintiff. The purpose of this order is to approve the preliminary statement in this case and approve the defendant's discovery authorized and ordered in the court's prior order. This case shall be placed upon the next available trial calendar.

IT IS SO ORDERED this 9th day of May,1986.

/s/ second judge
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES, INC.

Civil jury calendar commencing Monday,

Juen 2, 1986,...U.S.Courthouse ....

Dated at Atlanta, Georgia, this 9th day

of May 1986.

Luther D. Thomas, Clerk

by: Jerry W. Evans
Courtroom Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES, INC.

O R D E R

Presently before the court are the motions of plaintiff for reconsideration of the court's order of May 7,1986 to compel discovery, for extention of discovery, and for a continuance, and of defendant for sanctions. The court held a pretrial conference on May 30, 1986. Counsel for defendant and plaintiff, an attorney proceeding pro se, were present. AT the conference, plaintiff and counsel for defendant announced to the court that they had settled the case. Upon their representation, the court dismisses the instant suit with preju dice. All pending motions are denied as moot.

IT IS SO ORDERED, this 30th day of May1986.

/s/ second judge
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES, INC.

O R D E R

Presnetly before the court are the Platiff's motions to set aside this court's dismissal order of May 30, 1986, and to extend time the time within which to appeal. The May 30, 1986 order the platiff seeks to set aside dismissed the instant actionwith prejudice based upon the representation of plaintiff, an attorney proceeding pro se, and counsel for the defendant that the parties had reached a settlement. This representation was made at a pretrial conference held on May 30, 1986.

Plaintiff seeks to set aside the May 30, 1986 order and the underlying settlement agreement on the grounds of"mistake, surprise, duress, and other reasons justifying relief." Fed, R.Civ. P.60(b). The court takes note that settlements are a favored means of resolving disputes brought before

the court. Bennett v. Behring Corp., 737F.2d 982,986 (11th Cir. 1984). Also the court notes that while there is some uncertainty among the circuits, the Eleventh Circuit Court of Appeals has held that when determining whether a settlement agreement has been validly formed, the court should look to state law. Wong v. Bailey, 752 F.2d 619, 621 (11th Cir. 1985: Blum v. Morgan Guaranty Trust Co., 709 F.2d 1463,1467 (11th Cir. 1983); but see Gamewell Mfg. Inc. v. HVAC Supply Inc., 715 F.2d 112,116 (4th Cir. 1983) looking independently to derived federal"standards" to govern issues pertaining to settlements.

After review of the plaintiff's motions and file, the court concludes that the grounds for setting aside the dismissal order are meritless. Initially, the plaintiff contends that the defendant's filing of a motion for sanctions on May 29, 1986, the day before the settlement was reached, sufficiently "surprized" the plaintiff to warrant this court's setting aside of the resultant

settlement and dismissal order. First, there was no "surprise" as the defendant notified the plaintiff of its intention to file the motion for sanctions a week before the motion was actually filed. Second, equity hardly permits a party to deliberately fail to comply with an order of this court compelling discovery and then claim "suprise" when the other party subsequently files a motion for sanctions based upon that failure to comply.

Nor can plaintiff convincingly argue that his belief that the court would not grant his pending motions for a continuance and for an extention of time warrants the setting aside of the dismissal order. A party never knows how the court will rule prior to the court's actual ruling. It is just this fear of the unknown that ofter prompts parties to settle. Fear that the court will not rule in a party's favor does not constitute unilateral or mutual mistake sufficient to grant that party relief from a settlement agreement

or a resulting dismissal order. Additionally, the court notes that the plaintiff was informed at the May 30, 1986 pretrial conference that the court would have granted a continuance and an extention of discovery. The plaintiff, however, made no indication at that time that the settlement agreement therefore was improper or based upon a "mistake".

Plaintiff further contends that the defendant has made "misrepresentations" to the plaintiff and to the court concerning its conduct prior to the entry of default. Plaintiff's allegations however, are completely devoid of any supporting evidence. Plaintiff has raised these allegations repeatedly throughout the previous proceedings but has yet to substantiate them with any evidence. Absent supporting evidence, the court will not set aside the settlement or the resulting dismissal order.

Finally, the plaintiff contends that the dismissal order should be set aside because on light of his "emotional distress," the

defendant's motion for sanctions constituted "duress" and rendered the settlement agreement "unconscionable." Duress presumably falls under "any other reason justifying relief." Rule 60 (b)(6). The court notes that relief under the provision permitting a judgment to be set aside for"any other reaosn" is an "extraordinary remedy which may be invoked only upon a showing of exceptional circumstances" and the party seeking relief has the burden of establishing that absent such relief an "extreme" and"unexpected" hardship will result. Griffen v. Swim-Tech Corp., 772 F.2d 677,680 (11th Cir. 1984). A settlement before trial for $2500 of an action seeking $13,000 in actual damages is hardly "extreme" or "unexpected". This is particularly so where the plaintiff has opened himself up to sanctions for failing to comply with an order of this court concerning discovery.

Nor, under the law of Georgia, can plaintiff characterize the defendant's

filing of the motions for sanctions as "duress". The defendant merely exercised its legal right to move for sanctions as a result of the plaintiff's deliberate choice not to comply with the court's May7,1986 order compelling certain discovery. Cannon v. Kitchens, 240 Ga. 239,240, 240 S.E.2d 78 (1977). There is no evidence that the defendant's motion was filed frivolously or merely to coerce or harass the plaintiff. Concerning the plaintiff's contention of mental distress, the court notes that plaintiff has provided no evidence that he lacked the necessary contracting capacity to agree to the settlement. O.C.G.A 13-3-24. Plaintiff, rather merely contends that he was "distressed" by the court's adverse rulings and inability to "care" about his case. This hardly states a ground under Rule 60 (b) (6) to set aside the settlement agreement of the resulting May 30 ,1986 dismissal order.

Plaintiff has moved for an extention of time to appeal. The plaintiff may not appeal the settlement or the resulting dismissal order denying his Rule 60(b) motion. Under Fed. R. App. P 4(a) the plaintiff has 30 days to file an appeal of this order. Thus, plaintiff's motion to file an extention for 10 days of the time to appeal is moot.

Accordingly, the court denies the plaintiff's motions to set aside the May 30, 1986 dismissal of this action with prejudice and to extend for 10 days from the date of this order the time within which to appeal.

IT IS SO ORDERED, this 12th day of August, 1986.

/s/ second judge
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY v MERRILL LYNCH FUTURES, INC.

O R D E R

Before the court are plaintiff's motions for reconsideration of the court's denial of plaintiff's previous motion to set aside dismissal and plaintiff's motion to extent time in which to file an appeal. After careful review of the record, the court denies both motions.

In plaintiff's motion for reconsideration, plaintiff reiterates the same arguments as recited in his motion to set aside dismissal. In the court's previous order of August 12, 1986, the court, in great detail, set forth why it found plaintiff's reasons to set aside the dismissal meritless. Plaintiff has offered no convincing arguments in the motion for reconsideration to compel the court to reverse that order.

Plaintiff also seeks to extend time in which to file notice of appeal. Federal Rule of Appellate Procedure 4(a)(5) provides that:

"the district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after expiration of the time proscribed by this Rule 4(a)." Plaintiff's motion does not demonstrate facts that would support a finding of excusable neglect or good cause. Although the 30 day period for appeal is tolled by a timely motion for judgment under Federal Rules of Civil Procedure 50(b); for an altered or amended judgment under Federal Rules of Civil Procedure 59, a motion to reconsider an order ruling on one of the motions set forth above does not toll the 30 day period. Wansor v. George Hantscho Co. 570 F.2d 1202, 1206 (5th Cir 1978); Ellis v Richardson, 471 F.2d 720,720-21 (5th Cir. 1973).

This court is mindful that pro se plaintiff's should generally be given wider discretion by the court that a plaintiff represented by an attorney. Haines v. Kerner, 404 U.S. 519, 520 (1972). Although one reviewing the

pleadings in this case may be led to believe that plaintiff is a layman, plaintiff is a member of the bar of this court. Despite this fact the court has shown plaintiff wide discretion in this motion. There is no evidence in plaintiff's motion for an extention of time to appeal to support a finding of excusable neglect or good cause. In support of this motion, plaintiff recites the same meritless arguments that he has argued before this court in every motion considered by the court to date.

Accordingly, the court denies both plaintiff's motion for reconsideration of the court's denial of plaintiff's previous motion to set aside dismissal and plaintiff's motion to extend time in which to file notice of appeal.

IT IS SO ORDERED this 3rd day of October, 1986.

/s/ second judge
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES, INC.

O R D E R

On November 3, 1986 the plaintiff presented to the court an ex parte motion to extend the time in which to appeal. Fed. R. App. P.4(a)(4). The plaintiff seeks additional time to await the results of several medical tests. In deciding to deny plaintiff's most recent motion to extend the time in which to appeal, the court takes notice of the facts that (1) 165 days have elapsed since the court entered a dismissal of this action and (2) that the plaintiff indicated to the court that he has prepared a notice of appeal and is capable of finding it. The resolution of this case has already been delayed for too long and the plaintiff has had ample time to date to decide whether or not to proceed with anappeal. If the plaintiff

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intends to appeal, and the court is uncertain whether there remains much in this case that is still appealable, the plaintiff should go ahead and file his notice of appeal.[1]

Accordingly, the court on November 3, 1986 denied plaintiff's motion to extend the time to file an appeal.

IT IS SO ORDERED this 5th day of Noverber, 1986.

/s/ second judge
United States District Judge

1 It appears that the only order from which the plaintiff may still appeal is the October 3, 1986 order of the court denying his motions for reconsideration of a previous denial of a motion to set aside the dismissal and to extend the time in which to appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES, INC.

O R D E R

Presently before the court are the plaintiff's motions (1)"for relief for fraud upon the court and plaintiff" and (2)"to stay appeal and remand case to district court." The plaintiff filed the instant motions in both this court and in the Eleventh Circuit, where the case is presently on appeal. (No. 86-8812).

On the same day as the instant motions were filed, May 29,1987, the plaintiff approached the court ex parte. The plaintiff claimed to have evidence of an "egregious fraud" allegedly practiced on the court by defense counsel in their affidavits in support of defendant's motion to open default. The evidence consisted of copies of two receipts from the clerk's office apparently indicating

the date that the plaintiff filed his complaint and the first date that defense counsel obtained copies of his complaint. The court admonished the plaintiff about approaching the court ex parte and further informed him that the court was not then in position to discuss his allegations because nothing was then pending before the court. The court also questioned its jurisdiction because the case was on appeal.

In light of the plaintiff's motions and the gravity of the allegations, this court deems it appropriate to have a hearing on this matter. The court, therefore, schedules a hearing on the pending motions for July 2, 1987, at 9:30 a.m., in courtroom _____ United States Courthouse, 75 Spring Street, S.W., Atlanta, Georgia.

IT IS SO ORDERED THIS 19th day of June1987.

/s/ second judge
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES, INC.

O R D E R

Presently pending for consideration is the motion of plaintiff for relief for fraud upon the court and motion to stay the appeal and remand the case to district court. The court will only address plaintiff's motion for relief for fraud as the latter request does not properly address itself to this court. The court notes that plaintiff's motion does not set forth specific allegations of fraud, thus, making it difficult for defendant to respond to this motion.

The plaintiff has presented facts underlying his motion to the court on two separate occasions. First, the plaintiff approached the court ex parte on May 29, 1987 with his allegation of fraud. on that day the court admonished plaintiff for his

conduct and informed him that the court would only act upon a properly filed motion. After the plaintiff filed his motion, the court held a hearing on July 2, 1987 for the parties to present any evidence concerning the motion.

Although plaintiff's presentation at the hearing of the facts underlying this motion lasted for approximately 45 minutes, it was difficult for the court to understand exactly what allegations of fraud the plaintiff presentled. It appears that plaintiff is alleging that the local counsel for defendant Merrill Lynch Futures, Inc.,the law firm of Rogers & Hardin, knew about the underlying lawsuit at least as early as April 18,1985, when the law firm obtained a copy of plaintiff's complaint from the clerk's office. Plaintiff apparently contends that the affidavit of Paul A. Lieberman, Assistant Vice President and Counsel of Merrill Lynch Pierce, Fenner,& Smith, Inc. (Merrill Lynch), the parent company of

defendant Merrill Lynch Futures, Inc., dated June 18,1985, cannot be reconciled with the fact that Rogers & Hardin obtained a copy of the lawsuit on April 18,1985. Plaintiff seemingly further contends that the attorneys of record in this case at Rogers & Hardin knew that statements in Lieberman's affidavit were false but filed the affidavit, thus perpetrating a fraud on both the court and the plaintiff.

The court has carefully reviewed the Lieberman affidavit of June 18, 1985. In the Lieberman affidavit the affiant sets forth facts surrounding defendant's failure to timely respond to the suit filed by Plaintiff. Although in paragraph 7 of Lieberman's affidavit he discusses a later conversation he had with the attorneys at Rogers & Hardin, the affidavit is not at all inconsistent with attorneys at Rogers & Hardin having knowledge of the lawsuit prior to that conversation.

Through the affidavit of Paul Stivers, from Rogers & Hardin, the attorneys, who allegedly perpetrated a fraud in this case, presented a detailed explanation of how they learned of the lawsuit before Judge _____'s law clerk contacted that office concerning plaintiff's motion for a default judgment. Mr. Stivers explained that someone at the lawfirm regularly checks the list of new cases filed in the local courts in the Fulton County Daily Report. A report of the filing of this case appeared in the April 12, 1985 edition of that publication. After Mr. Stivers learned that a case had been brought against Merrill Lynch, a sometimes client of that firm, he instructed a messenger of the firm to obtain a copy of the complaint, which was obtained on April 18,1985. Stivers later contacted Merrill Lynch about the case and offered his assistance in the action.

Because there is no inconsistency between

the law firm of Rogers & Hardin obtaining a copy of the complaint in this case on April 18, 1985, and the affidavit of Lieberman given on June 18, 1985, the court denies. plaintiff's motion for relief for fraud.

IT IS SO ORDERED this 16th day of July, 1987.

/s/ second judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BEAZLEY V. MERRILL LYNCH FUTURES,INC.

O R D E R

Presently before the court for consideration are the motion of plaintiff for reconsideration of this court's order of July 16, 1987, the motion of defendant for sanctions pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C.1927, and the motion of plaintiff for recusal.

The court will first address plaintiff's motion for recusal. Plaintiff has moved for recusal by this court pursuant to 28 U.S.C 455(b)(4) and (e). In his motions plaintiff states: "This request is made notwithstanding a disclosure of his spouse's account with defendant's parent or related companies(sic) because no waivers are permitted. A disclosure was told to plaintiff." Apparently plaintiff contends that this court should recuse himself because the wife of the

undersigned maintains an account with Merrill Lynch,Pierce,Fenner, & Smith, Inc., (MLPF&S), a related company to defendant Merrill LYnch Futures, Inc. As plaintiff notes in his motion, this court in a Rule 16 conference held on March 7, 1986, approximately three months after this case was reassigned to this court, informed Plaintiff that his wife maintained a margin account with a related company to the defendant. The court discussed the matter with the plaintiff at length. At the time the court stated that it did not consider the maintenance of an account to be of financial interest, but wished for the plaintiff to be informed of his wife's account. The plaintiff assured the court that the account would "be no problem".

Althogh the plaintiff is correct that the court must recuse itself in any case in which the court or a member of his family would have a financial interest,

maintenance of the account in question is not a basis for disqualification of this court. The statute on which Plaintiff relies, 28 U.S.C 455(b)(4) provideds that a judge shall disqualify himself when:

> (h)e knows....his spouse...has a financial interest in the subject matter in the controversy or is a party to the proceeding, or any other interest that could be substancially affected by the outcome of the proceeding.

"Financial interest" is defined under the statute as:

> ownership of a legal or equitable interest, however small, or a relationship as a director, advisor or other participant in the affairs of a party...

28 U.S.C 455(d)(4).

Mrs. _____'s maintenance of an account with MLPF&S does not make her an owner of any legal or equitable interest in that corporation. The maintenance of a margin account with a brokerage corporation is similar to other types of consumer credit, neith the amount that Mrs. _____ owes

to that corporation nor the credit terms of that loan will be affected by this or any other lawsuit. Thus, a margin account is analogous to a debt to a department store or a loan from a bank, the financial condition of that entity does not affect the terms or the amount of any existing liabilities. For these reasons, neither the court nor anyone in the court's immediate family has a"financial interest" in a related company to the defendant. Accordingly, the court denies plaintiff's motion for recusal.

The court will now address plaintiff's motion for reconsideration. The basis for plaintiff's motion for reconsideration is that at the time the court ruled on plaintiff's motion for relief for fraud, the court did not have plaintiff's reply brief to defendant's response to that motion. The local rules of this court allow a reply to be filed to a motion, but such a

pleading is not necessary as a routine practice. LR220-1(b)(2),NDGa.

In this case, the court was informed on two occasions that the plaintiff intended to file a reply brief. The court was under the impression , however, that the reply brief would be filed forthwith. The court delayed ruling in this matter to allow plaintiff to files his reply brief. Although on the date the court ruled on his motion plaintiff's reply brief had filed with the clerk of the court, that pleading had not been forwarded to the undersigned. Because the plaintiff timely filed his reply brief, the court grants plaintiff's motion for reconsideration.

After careful consideration of the arguments outlined in plaintiff's reply brief, the court denies plaintiff's motion for relief from fraud. There is no inconsistency between the conduct of attorneys at Rogers & Hardin obtaining a copy of the complaint in this case on

April 18, 1985 and the affidavit of Paul A. Lieberman of June 18,1985. (See order of July 16, 1987).

On JUne 24, 1987, the defendant filed a motion for sanctions pursuant to rule 11 and 28 U.S.C 1927. Plaintiff has not responded to this motion. Defendant argues that plaintiff's motions of May 29,1987, styled as "Motion for Relief for Fraud upon the Court and Plaintiff" and "Motion to Stay appeal and Remand Case to the District Court" were not based upon a reasonable belief formed after reasonable inquiry that they were well founded in fact and warranted by existing law within the meaning of rule 11 and that the motions unreasonably and vexatiously multiplied the proceedings in this case within the meaning of 28 U.S.C 1927.

After careful consideration of defendant's motion the court finds it to be meritorious. On July 2, 1987, the court conducted a

lengthy hearing[1] on plaintiff's motions. After hearing the evidence on this motion, the court found no factual basis for relief from fraud. Supra.

From the facts presented to the court, the court finds that plaintiff did not make a reasonable inquiry before filing the motion in question. Before plaintiff filed his motion he approached the court ex parte claiming to have evidence of "egregious fraud" practiced on the court by defense counsel. The court admonished the plaintiff for approaching the court ex parte and informed him that the court could not discuss his allegations until a proper motion was pending before the court. It was the court's understanding from that discussion that plaintiff had on that day obtained the evidence which he believed would proce fraud by the defendant. On that same date, plaintiff filed his motion for fraud. Plaintiff did not present any

evidence that he conducted even a cursory investigation of his allegations before filing his motion.

Plaintiff received defendant's response to his motion on the day of the hearing but sufficiently before the hraing that he could have read it. The plaintiff informed the court, however, that he refused to read the response because he did not want to become upset, and he wanted to show the court that he could anticipate any explanation that Merrill Lynch might offer. In its response, defendant sets forth a reasonable explanation for the evidence on which plaintiff relies to prove fraud. If plaintiff had chosen to read the response, hr might have realized that his allegations were factually baseless. Instead, plaintiff spent approximately one hour rearguing issues that were unrelated to his motion for fraud and presenting an insufficient factual basis to support his allegations of fraud.

The court is mindful that plaintiff, although an attorney, is proceeding in this case pro se. This court is always careful to construe the proceedings of pro se plaintiffs liberally and to accord them all reasonable deference. Haines v. Kerner, 404 U.S. 519 (1972); Byrd v. Stewart, 811 F.2d 554 (11th Cir. 1987). The sanctions of rule 11, however, are applicable to all who sign pleadings presented to this court, including parties proceeding pro se. See, e.g., Dominquez v. Figel, 626 F.Supp. 368, 373 (N.D.Inc. 1986).

This motion is plaintiff's latest attempt to relitigate issues that were previously decided adversely to him. Illustrative of such attempts by the plaintiff are the numerous motions he has filed for reconsideration and his motion for recusal of this court. Each motion filed by the plaintiff requires both the court and defendants to expend a considerable amount of time,

energy, and resources before the motion can be resolved. Plaintiff's motion for relief from fraud is no exception.

The court further notes that the filing of this motion unreasonably and vexatiously multiplied the proceedings in this case within the meaning of 28 U.S.C 1927. This case was before the Eleventh Circuit Court of Appeals at the time plaintiff filed his motion. Not only was it necessary for the district court to acertain whether it had jurisdiction to consider this motion before it could proceed, but the record of all earlier proceedings in this case were unavailable to the court. Furthermore, defendant was forced to proceed in two courts at the same time to defend the same lawsuit.

In light of these facts, the court considers defendant's request for sanctions in the amount of $2500.00 to be reasonable. Defendant submitted a detailed outline of the time expended by defendant's attorneys in defending this motion, along with the

affidavit of lead counsel for defendant verifying that information. The court finds that the time expended by defendant's attorneys in defending this motion, along with the affidavit of lead counsel for defendant verifying that information. The court finds that the time expended by defendant's attorneys on this motion is reasonable and the hourly rates charged by defendant's attorneys are consistent with rates charged in this area by attorneys of similar experience and expertise. An example of the reasonableness of defendant's request is defendant's decision not to seek sanctions in the amount sufficient to reflect the time spent by C.B.Rogers, a senior partner in the law firm employed by defendant, in responding to the motion. His time is not listed. For the above state reasons, the court grants defendant's request for sanctions in the amount of $2500.00.

Defendant suggests that the court impose a fine to be paid to the United States Treasury in the same amount as is requested by defendant for sanctions. At least one other court has imposed such a fine. Dominguez v Figel, 626 F.Supp. 368 (N.D. Ind. 1986) In Dominguez, the court, relying on a law review article concerning the costs of litigation, determined that one hour spent by a federal judge on a case costs the goverment $600.00. Using this as a basis, the court fined the plaintiff for the time expended by the court on his factually baseless suit. Although the court considered defendant's request, it will not fine plaintiff at this time. The case-load of this court, as well as any other federal court, is too heavy for the court to be burdened with factually baseless suits or motions that drain the court's resources from meritorious actions. The court will

not hesitate to impose a fine at a later time if plaintiff continues to file frivolous motions.

The clerk is directed to send a copy of this order to the clerk of the Eleventh Circuit Court of Appeals.

IT IS SO ORDERED THIS 14th day of August, 1987.

/s/ second judge

United States District Court

1 In a recent opinion, Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987)(en banc), the Eleventh Circuit set forth guidelines for procedural due process a court should accord a person before assessing rule 11 sanctions against him. Under these guidelines plaintiff is entitled to notice and opportunity to be heard. Id at 1559. Clearly, plaintiff has notice of the requirements of rule 11 and the pending rule 11 motion. Under the guidelines of that case, the hearing held on plaintiff's motion for fraud, which gave plaintiff an opportunity to present the factual basis for that motion, is sufficient to meet the hearing requirement. Plaintiff also had an opportunity to respond by brief to defendant's motions for sanctions, but chose not to answer. For these reasons, the court finds that a further hearing on the sanctions issue is unnecessary. Id at 1561.

Rule 4. Appeal as of Right—When Taken.

(a) APPEALS IN CIVIL CASES.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the

entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) APPEALS IN CRIMINAL CASES. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may,

(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28, U.S.C. § 1916,

(ii) on behalf of the United States or an officer or agency of the United States, or

(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

11.1 References

2A Moore's Federal Practice, Chapter 11.

2 Bender's Federal Practice Forms, Rule 11, Form No. 2137, et seq.

1 Moore's Manual–Federal Practice and Procedure, § 9.08.

1 Moore's Manual–Federal Practice Forms, Form No. 9:21A, et seq.

Rule 55. Default.

(a) ENTRY. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) JUDGMENT. Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) PLAINTIFFS, COUNTERCLAIMANTS, CROSS-CLAIMANTS. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) JUDGMENT AGAINST THE UNITED STATES. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

55.1 References

6 Moore's Federal Practice, Chapter 55.

3 Bender's Federal Practice Forms, Rule 55, Form No. 3269, et seq.

3 Moore's Manual—Federal Practice and Procedure, § 25.04.

4 Moore's Manual—Federal Practice Forms, Form No. 25:21, et seq.

55.2 History of Rule

[1]—General History

In 1987, subdivisions (a), (b) and (e) were amended to eliminate all gender-specific language.

As to applicability of the Soldiers' and Sailors' Civil Relief Act, see 50 USC App 501, *et seq;* ¶¶ 55.01[1], [6], 55.10[3], 55.13.

[2]—1987 Amendment to Rule 55

Rule 55 was amended, effective August 1, 1987, as follows (matter stricken out is in brackets; new matter is in italics):

(a) ENTRY. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter [his] *the party's* default.

(b) JUDGMENT. Judgment by default may be entered as follows:

Rule 59. New Trials; Amendment of Judgments.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

59.1 References

6A Moore's Federal Practice, Chapter 59.

Rule 60. Relief From Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of

(IN ATLANTA, FULTON COUNTY, GEORGIA; ON MARCH 7, 1986, AT 10:00 O'CLOCK, A.M.; IN JUDGE'S CHAMBERS.)

- - -

THE COURT: OKAY. I HAD A SETTLEMENT CERTIFICATE THAT WAS SUBMITTED. IN REVIEWING IT, IT APPEARED THAT ONE OF YOU HAD REQUESTED A SETTLEMENT CONFERENCE AND THE OTHER SAID YOU DID NOT OPPOSE IT BUT DOUBTED THE VALUE OF IT, BUT UNDER THE CIRCUMSTANCES I FELT WE SHOULD HAVE A SETTLEMENT CONFERENCE.

MR. BEAZLEY: YOUR HONOR, IT'S MY UNDERSTANDING THAT WE ARE WORKING ON A PRELIMINARY STATEMENT.

THE COURT: OKAY. I KNEW I DIDN'T HAVE IT HERE. I ASSUMED IT WAS ALREADY IN.

MR. STIVERS: WE WILL GET THAT IN --

THE COURT: THAT ANSWERS THAT.

I HAVE SEVERAL MOTIONS -- I SAY SEVERAL. I THINK AT LEAST TWO OR THREE FOR CONSIDERATION.

THE PURPOSE OF THIS HEARING THIS MORNING WAS NOT TO PARTICULARLY CONSIDER THOSE BUT MORE TO CONSIDER THE REQUEST FOR A CONFERENCE.

LET ME BEFORE WE START OUT, AS I HAVE NOT DONE MUCH OTHER THAN REVIEW THE SETTLEMENT STATEMENT AND I THINK MAYBE ENTER AN EXTENSION ORDER OR SOMETHING SINCE OUR HEARING IN COURT -- IT SEEMS LIKE I REMEMBER SIGNING SOME SORT OF INNOCUOUS ORDER. WAS THERE AN EXTENSION REQUESTED

OF SOME SORT?

MR. STIVERS: EXTENSION OF TIME FOR DISCOVERY, YOUR HONOR, WHICH YOU GRANTED.

THE COURT: I THOUGHT I HAD SIGNED SOME SORT OF AN ORDER, BUT OTHER THAN THAT, I HAVE NOT REALLY DONE ANYTHING IN THIS CASE SINCE THE HEARING IN THE COURTROOM. I HAVE BEEN WORKING ON OTHER CASES AND PROBABLY WOULDN'T DO ANYTHING ON THE PENDING MOTIONS PROBABLY UNTIL APRIL AT LEAST BECAUSE OF OTHER THINGS THAT I HAVE THAT ARE AHEAD OF IT.

I DON'T THINK THAT IT MAKES ONE BIT OF DIFFERENCE AS A MATTER OF LAW, BUT I THINK I OUGHT TO AT LEAST PUT IT ON THE RECORD AND DISCLOSE TO COUNSEL AND PLAINTIFF -- I AM NOT SURE OF THE RELATIONSHIP BETWEEN MERRILL LYNCH FUTURES, INC. OR MERRILL LYNCH COMMODITIES, INC., WHATEVER THEY ARE, AND MERRILL, LYNCH, PIERCE, FENNER AND SMITH, THE STOCKBROKERS. I ASSUME THEY MUST BE IN SOME WAY RELATED, BUT I DON'T KNOW WHAT IT IS. AND I'M NOT SURE OF THE EXACT NAME OF THE STOCK BROKERAGE COMPANY. BUT MY WIFE HAS AN ACCOUNT THERE.

I DON'T THINK THAT MAKES ONE IOTA'S DIFFERENCE. I TRY CASES AGAINST GENERAL MOTORS AND WE BUY CARS FROM GENERAL MOTORS. I DON'T HAVE ANY STOCK IN IT. I DON'T HAVE ANY INTEREST IN IT, ANYTHING ELSE, OTHER THAN SHE HAS A BROKERAGE ACCOUNT THERE.

I DO NOT. I HAVE ONE ELSEWHERE, ANOTHER COMPANY, BUT SHE DOES.

I DON'T THINK THAT -- EVEN IF THERE'S A CONNECTION, AND I ASSUME THERE MUST BE SOME CONNECTION BETWEEN MERRILL LYNCH, USING THE SAME NAME.

DO YOU HAVE ANY QUESTION ABOUT IT, MR. BEAZLEY?

I AM A BELIEVER IN FOLKS OUGHT TO KNOW. I DON'T THINK IT MAKES ANY DIFFERENCE. IF I OWNED STOCK IN MERRILL LYNCH, I WOULD BE DISQUALIFIED, WOULDN'T EVEN BOTHER TO TELL YOU ABOUT IT. I WOULD ENTER AN ORDER OF RECUSAL. BUT MERELY HAVING AN ACCOUNT THERE I DON'T THINK MAKES ANY DIFFERENCE ANY MORE THAN HAVING A CHARGE ACCOUNT WITH GULF OIL OR AMOCO. I TRY CASES INVOLVING A LOT OF PLACES WHERE I CHARGE THINGS OR HAVE A TRADE -- DO YOU HAVE ANY QUESTION ABOUT IT?

MR. BEAZLEY: NO, YOUR HONOR. I DO NOT HAVE ANY PROBLEM WITH THAT AT ALL. AS I UNDERSTAND IT, THE MAIN CORPORATION IS MERRILL LYNCH AND COMPANY, INC.

THE COURT: WHATEVER IT IS --

MR. BEAZLEY: AND THEN THEY HAVE A STOCK BROKERAGE COMPANY, AND WHERE THIS DEFENDANT FITS IN THERE --

THE COURT: I HAVE NO KNOWLEDGE OF IT. I DON'T KNOW THEIR CORPORATE STRUCTURE. I THOUGHT IT WAS MERRILL, LYNCH, PIERCE, FENNER AND SMITH. DO I HAVE THEM WRONG?

MR. STIVERS: THAT'S CORRECT, YOUR HONOR, AND THAT

IS A SUBSIDIARY OF A HOLDING COMPANY CALLED MERRILL LYNCH AND COMPANY.

THE COURT: I DO KNOW THEY ARE A PUBLICLY HELD CORPORATION, I BELIEVE.

MR. STIVERS: THE HOLDING COMPANY IS.

THE COURT: THE HOLDING COMPANY IS.

MR. STIVERS: (NODS HEAD AFFIRMATIVELY).

THE COURT: BUT I HAVE NOT NOR HAVE I EVER HAD ANY STOCK INTEREST OR ANYONE IN MY FAMILY IN THAT.

MR. BEAZLEY: YOUR HONOR, IT'S ALSO MY UNDERSTANDING WHEREAS SOME BROKERAGE HOUSES HAVE STOCKBROKERS AND COMMODITY TRADER BROKERS TOGETHER, IT'S BEEN MY EXPERIENCE THAT THIS DEFENDANT HAS A SEPARATE COMMODITY TRADER.

THE COURT: I GATHERED THAT FROM THE NAME. I GATHERED THAT FROM THE NAME. BUT I DON'T THINK THAT IS IMPORTANT TO WHAT I AM DOING NOW.

I HAVE THE GENERAL PRACTICE, YOU KNOW, IF THERE'S ANYTHING, THAT IT OUGHT TO BE DISCLOSED. IN FACT, I RECUSED MYSELF IN A CASE YESTERDAY, I BELIEVE IT WAS, OR DAY BEFORE YESTERDAY ONE.

THE CLERK: YESTERDAY.

THE COURT: IN WHICH I DID OR MY WIFE DID -- MY WIFE AND MOTHER OWNED A LITTLE STOCK IN IT.

MR. BEAZLEY: YES, YOUR HONOR. WELL, THANK YOU

Supreme Court Clerk's Office, see § 2 Comment.

Notes of Decisions

2. Generally

Notwithstanding expiration of rehearing period, a federal appellate court has power to recall a mandate in appropriate instances. American Iron and Steel Institute v. Environmental Protection Agency, C.A.3, 1977, 560 F.2d 589, certiorari denied 98 S.Ct. 1467, 435 U.S. 914, 55 L.Ed.2d 505.

Fact that Federal Communications Commission request that Court of Appeals recall its mandate affirming Commission's order awarding construction permit to television broadcaster was filed within the same term as the mandate was of no significance as to power of court to recall mandate; significance of the "term concept" was removed by 1948 amendment to the Judicial Code. Greater Boston Television Corp. v. F.C.C., 1971, 463 F.2d 268, 149 U.S.App.D.C. 322.

§ 453. Oaths of justices and judges

Notes of Decisions

1. Duty of court

Federal courts cannot countenance deliberate violations of basic constitutional rights; to do so would violate judicial oath to uphold Constitution of United States. Adamson v. C.I.R., C.A.9, 1984, 745 F.2d 541.

§ 454. Practice of law by justices and judges

West's Federal Forms

Disqualification of judge due to bias or prejudice, see § 5152 Comment.

Notes of Decisions

2. Generally

Military judge does not come within prohibition set forth in this section against practice of law by any justice or judge appointed under authority of United States. U.S. v. Rachels, CMA 1979, 6 M.J. 232.

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(As amended Dec. 5, 1974, Pub.L. 93–512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95–598, Title II § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub.L. 100–702, Title X, § 1007, 102 Stat. 4667.)

1988 Amendment. Subsec. (f). Pub.L. 100–702 added subsec. (f).

1986 Amendment. Pub.L. 99–554, Title I, § 144(g)(2), Oct. 27, 1986, 100 Stat. 3097, substituted "40" for "39" in item relating to the Independent Counsel.

1978 Amendment. Pub.L. 95–598 struck out references to referees in bankruptcy in the section catchline and in subsecs. (a) and (e).

1974 Amendment. Pub.L. 93–512 substituted "Disqualification of justice, judge, magistrate, or referee in bankruptcy" for "Interest of justice or judge" in section catchline, reorganized structure of provisions, and expanded applicability to include magistrates and referees in bankruptcy and grounds for which disqualification may be based, and added provisions relating to waiver of disqualification.

Effective Date of 1978 Amendment. Amendment by Pub.L. 95–598 effective Oct. 1, 1979, see section 402(c) of Pub.L. 95–598, set out as a note preceding section 101 of Title 11, Bankruptcy. For procedures relating to bankruptcy matters during transition period, see note preceding section 151 of this title.

Effective Date of 1974 Amendment. Section 3 of Pub.L. 93–512 provided that: "This Act [amending this section] shall not apply to the trial of any proceeding commenced prior to the date of this Act [Dec. 5, 1974], nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act."

Legislative History. For legislative history and purpose of Pub.L. 93–512, see 1974 U.S. Code Cong. and Adm. News, p. 6351. See, also, Pub.L. 95–598, 1978 U.S. Code Cong. and Adm. News, p. 5787; Pub.L. 100–702, 1988 U.S. Code Cong. and Adm. News, p. 5982.

Federal Practice and Procedure

Bases and procedures for disqualification of federal judges, see Wright, Miller & Cooper: Jurisdiction 2d § 3541 et seq.

Competency of witnesses, see Wright: Criminal 2d § 405.

Procedure for disqualification at hearings, see Wright: Criminal 2d § 600.